

Federal Communications Commission

FCC 96D-05

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	MM DOCKET NO. 96-117
)	
WPVG, INC.)	File No. BR-950601VH
)	
For Renewal of License)	
for Station WPVG(AM))	
Funkstown, Maryland)	

Appearances

Roy F. Perkins, Jr., Esquire, on behalf of WPVG, Inc.; and *Alan E. Aronowitz, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

FCC MAIL SECTION
SEP 6 11 52 AM '96
DISC 1-117

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: September 3, 1996

Released: September 5, 1996

Preliminary Statement

1. By *Hearing Designation Order*, DA 96-814, adopted May 16, 1996, and released May 22, 1996 ("*HDO*"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, designated for hearing the application of WPVG, Inc. ("WPVG" or "Licensee"), for renewal of license for Station WPVG(AM), Funkstown, Maryland. The following issues were specified:

- (1) To determine whether WPVG, Inc. has the capability and intent to expeditiously resume the broadcast operations of WPVG(AM), consistent with the Commission's Rules.
- (2) To determine whether WPVG, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

The *HDO* further provided that, in the event it is determined that a grant of the renewal application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. *HDO* at para. 4. The *HDO* placed upon the Licensee both the burden of proceeding with the introduction of evidence and the burden of proof. *Id.* at para. 7. A prehearing conference was held on July 9, 1996. (Tr. 4-16.)

2. Presently under consideration are a Motion for Summary Decision, filed on August 15, 1996, by WPVG, and comments in support thereof, filed on August 26, 1996, by the Mass Media Bureau.

Findings of Fact

3. The *HDO* recited the following facts as the basis for the specification of the issues in this proceeding:

WPVG suspended operations on October 30, 1994 when the owner of the station's transmitting antenna site ordered the [L]icensee to remove its facilities from the property. WPVG reported that it was in the process of establishing a new tower site, and that it would file the appropriate application when zoning approval was received for the new location. In its June 1, 1995 renewal application WPVG reported that its search for a new site was complicated by the necessity to secure a site that would serve both WPVG's needs while protecting AM Stations WMET (Gaithersburg, Maryland) and WCCS (Homer, Pennsylvania) from interference. On September 12, 1995, WPVG reported that it was negotiating for two possible sites, that it hoped to finalize an agreement for one of these sites by September 24, 1995, and that it expected to file the proper application (FCC Form 301) for this site when the site owner accepted its offer. The special temporary authority approving WPVG's September, 1995 request [to remain silent] expired March 27, 1996. A review of the record for this station does not indicate that an application to relocate the station's transmitting antenna has been filed. Further, the [L]icensee has neither notified the Commission that broadcast operations have resumed nor requested further extension of its special temporary authority. Therefore, WPVG is in apparent violation of Sections 73.1740 and 73.1750 of the Commission's Rules.

HDO at para. 2 (footnotes omitted).

4. In its Motion for Summary Decision, the Licensee does not dispute that portion of the *HDO* which summarizes the facts pertaining to the loss of its transmitter site. (Motion at 3.) Rather, WPVG challenges the accuracy of the *HDO*'s statement that no application to relocate the station's transmitter had been filed. In support, WPVG relies on the following additional facts.

5. On April 18, 1996, the Licensee filed an application (under FCC Form 301) for a construction permit for a new transmitter site. The cover letter to that application stated, *inter alia*, that "Station WPVG is presently off the air and will be until the station is built after the CP is granted." (Motion at 3 and Att. A.) Public notice of the receipt and acceptance of the application for the new site was issued by the Commission on May 13, 1996. (*Public Notice*, "Broadcast Applications," Report No. 23736, dated May 13, 1996, at 6.)

6. On May 30, 1996, eight days after the release of the *HDO* in this proceeding, the Licensee's counsel, by letter, requested the Commission to extend for six months the authority for WPVG to remain silent. The letter stated as grounds for the extension request that WPVG was silent due to the loss of its leased antenna-transmitter site, and that the Licensee was forced by the lessor to remove its equipment, including the tower. The letter noted that a new site had been located, that an application to construct the WPVG transmitting facilities at the new site had been filed with the Commission, and that the application had been accepted for filing. (Letter from Roy F. Perkins, Jr., to William F. Caton, Acting Secretary of the Commission, dated May 30, 1996.)

7. On June 6, 1996, the Licensee's counsel, by letter to the Mass Media Bureau's Audio Services Division, requested that action be expedited on WPVG's pending application for a construction permit for a new transmitter site. The letter was filed pursuant to *Public Notice*, "Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations," DA 96-818, released May 22, 1996. Counsel's letter noted that the station was silent due to the eviction from its former site, and that a grant of the application for a new site was necessary for WPVG to resume broadcast operations. (Letter from Roy F. Perkins, Jr., to James Crutchfield, Audio Services Division, dated June 6, 1996.)

8. By letter dated June 27, 1996, from an engineer in the Audio Services Division, the Licensee was advised of technical deficiencies in its application for a new transmitter site. The letter afforded the Licensee 30 days within which to file a curative amendment. (Motion at 4 and Att. B.) The Licensee's curative amendment was filed with the Commission on July 24, 1996. (*Id.* at 4.)

9. By fax message dated July 30, 1996, from an engineer in the Audio Services Division, the Licensee was advised as follows:

Ready to grant WPVG app[lication] as soon as FAA approval received.
Fax FAA approval to me as soon as you receive it.

Warning: Failure to resume broadcast operations by Feb[ruary] 9, 1997, or the 12 month silent period ending thereafter will result in the loss of the licensed WPVG facilities. Lack of FAA approval will not delay loss of licensed facility due to Telecom Act of 1996.

(Motion at 4 and Att. C.)

Conclusions of Law

10. The Motion for Summary Decision will be granted and the issues will be resolved in WPVG's favor. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision a party must show that there is no genuine issue of material fact remaining for determination at the hearing. In order to sustain such a motion, it must be established that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). WPVG has met this stringent test.

11. With respect to Issue 1, WPVG has established that the factual basis for the specification of this issue was in error. Thus, the Licensee has shown that the relevant portion of the *HDO* was premised upon the erroneous assumption that no application to relocate the station's transmitting antenna had been filed prior to the issuance of the *HDO*. However, as shown by WPVG, an application for a new transmitter site had been filed on April 18, 1996, and was accepted for filing by *Public Notice* dated May 13, 1996. Both of those events took place prior to the adoption and release of the *HDO*. By filing its application for a new transmitter site, and by diligently prosecuting and seeking the expedited processing of that application, WPVG has demonstrated that it is earnestly seeking to restore the station to the air as promptly as possible. Indeed, it appears that the Audio Services Division is ready and willing to grant WPVG's modification application as soon as FAA approval is obtained. Consequently, WPVG has satisfied its burden of showing that it has the capability and intent expeditiously to resume the broadcast operations of its station, and Issue 1 is resolved in its favor.

12. Turning to Issue 2, it must be concluded that, although the Licensee did not violate Section 73.1750 of the Commission's Rules, it was in violation of Section 73.1740(a)(4) of the Rules for a brief period of time. Such violation, however, does not reflect adversely upon the basic qualifications of WPVG to remain a Commission licensee.

13. Section 73.1750 of the Commission's Rules provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

The Licensee did not violate this section of the rules. WPVG clearly had the intention to restore the station to operation. This is demonstrated by the fact that it located a new site for its transmitter, prepared and filed the requisite application for that site, and has diligently prosecuted its application since that time. Further, there is no evidence that WPVG intended to discontinue permanently the operation of its station.

14. Section 73.1740(a)(4) of the Commission's Rules provides, in pertinent part:

In the event that causes beyond the control of a licensee make it impossible . . . to continue operating, the station may . . . discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of . . . discontinued operation. . . . In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

The Licensee was in violation of this provision of the rules for approximately two months. Thus, WPVG's special temporary authority to remain silent expired on March 27, 1996, but no written request for an extension of that authority was made until May 30, 1996. However, this violation is partially mitigated by the fact that the Licensee did notify the Commission within 30 days of the expiration of the special temporary authority that the station remained silent. Specifically, in its April 18, 1996, cover letter accompanying WPVG's modification application, the Licensee stated that the station was off the air, and would remain off the air until the station was built after the Commission issued a construction permit. As noted above, this rule violation does not impact adversely upon the Licensee's basic qualifications. *Cf. Video Marketing Network, Inc.*, 10 FCC Rcd 7611, 7613 (MMB 1995); *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995). Therefore, Issue 2 is resolved in the Licensee's favor.

Ultimate Conclusion

15. In sum, it has been concluded that the Licensee has the capability and intent expeditiously to resume the broadcast operations of WPVG(AM) consistent with the Commission's Rules, that the Licensee did not violate Section 73.1750 of the Commission's Rules, and that the Licensee did violate Section 73.1740(a)(4) of the Rules for a brief period of time. It has been further concluded that the Licensee's rule violation is not disqualifying. It is, therefore, ultimately concluded that the public interest, convenience and necessity would be served by a grant of the Licensee's renewal application. *Cf. Video Marketing Network, Inc.*, *supra*; *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (MMB 1995); *Cavan Communications*, *supra*. However, the grant will be conditioned on the resumption of broadcast operations on or before February 8, 1997. *HDO* at para. 4; 47 U.S.C. § 312(g).

Accordingly, IT IS ORDERED that the Motion for Summary Decision filed by WPVG, Inc., on August 15, 1996, IS GRANTED and Issues 1, 2 and 3 ARE RESOLVED in the Licensee's favor.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections

1.251(e) and 1.276 of the Rules, the above-captioned application of WPVG, Inc., for renewal of license for Station WPVG(AM), Funkstown, Maryland, IS GRANTED subject to the condition that the station SHALL RESUME broadcast operations on or before February 8, 1997.¹

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

¹ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections 1.251(e) and 1.276(d) of the Rules.